

**A Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey
 Hoe Sdn Bhd & Ors**

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPLICATION NO P-
02-34 OF 1997

DENIS ONG, MOHD NOOR AHMAD AND ABDUL AZIZ JJCA

11 JULY 2002

Civil Procedure — Judge — Disqualification — Application to disqualify appellate judge from hearing appeal — Appellate judge on panel that dismissed appeal by appellants on a preliminary objection — Whether there was a real danger of bias — Whether appellate judge had considered merits of the case

This was the appellants' application for an order that Denis Ong JCA be at liberty 'to recuse himself from hearing and determining all further proceedings in the appeal herein'. The appellants relied on the principle that justice must not only be done but must also be seen to be done. Relying on that principle, while 'not alleging any actual bias' on the part of Denis Ong JCA, the appellant said that 'an impartial and reasonable and fair minded bystander with knowledge of the relevant facts' would think that 'there is a real danger of bias that a fair hearing ... before [Denis Ong JCA] will no longer be possible however much [Denis Ong JCA] may judiciously strive to avoid it'. The 'relevant facts' that the appellants cited was the fact that Denis Ong JCA was on the panel that made the decision on 7 November 1999 to dismiss an appeal, a decision adverse to the appellants, on a preliminary objection.

Held:

It was not so much the fact that a decision adverse to the appellants, that is the dismissal of their appeal, had been made that was important. What was important is the fact that in making that decision, the panel, including Denis Ong JCA, had not considered the merits. No reasonable bystander who knew of the circumstances would fear that Denis Ong JCA might be affected by bias when he considered the merits. There was simply no circumstance to cause a fair minded and informed bystander to entertain a fear of real danger of bias. Therefore, the application should be dismissed (see p 331C-D).

[Bahasa Malaysia summary]

Ini merupakan permohonan perayu-perayu untuk suatu perintah bahawa Denis Ong HMR bebas 'to recuse himself from hearing and determining all further proceedings in the appeal herein'. Perayu-perayu menggunakan prinsip bahawa keadilan bukan sahaja perlu dilaksanakan, tetapi perlu dilihat terlaksana. Bergantung kepada prinsip tersebut, walaupun 'not alleging any actual bias' pada Denis Ong HMR, perayu-perayu mengatakan bahawa 'an impartial and

reasonable and fair minded bystander with knowledge of the relevant facts' akan berpendapat bahawa 'there is a real danger of bias that a fair hearing ... before [Denis Ong JCA] will no longer be possible however much [Denis Ong JCA] may judiciously strive to avoid it'. 'Relevant facts' yang dikatakan oleh perayu-perayu adalah bahawa Denis Ong HMR telah menduduki panel yang membuat keputusan pada 7 November 1999 untuk menolak rayuan, suatu keputusan yang bertentangan kepada perayu-perayu, pada suatu bantahan awal.

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Diputuskan:

Bukan bahawa suatu keputusan yang bertentangan kepada perayu-perayu, bahawa rayuan mereka telah ditolak, telah dibuat yang penting. Apa yang penting adalah dalam membuat keputusan tersebut, panel, termasuk Denis Ong HMR, tidak menimbangkan merit-meritnya. Tiada pemerhati yang waras yang mengetahui keadaan yang akan berpendapat bahawa Denis Ong HMR akan dipengaruhi oleh berat sebelah apabila beliau menimbangkan merit-meritnya. Tiada keadaan yang akan menyebabkan pemerhati yang berfikiran waras dan berpengetahuan untuk bimbang akan terdapat berat sebelah. Oleh itu, permohonan tersebut harus ditolak (lihat ms 331C-D).

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Notes

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For cases on disqualification of judges, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2113–2115.

Cases referred to

F

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin [1995] 2 MLJ 213 (refd)

Appeal from: Civil Suit No 22–109–1993 (High Court, Pulau Pinang)

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Dato' VK Lingam (Lye Poh Kham & Associates) for the appellants.

Tan Lip Gay (Leong, Ng & Tan) for the first respondent.

Dato' Ghazi Ishak (Ghazi & Lim) for the second respondent.

Rfj Manecksha (Ong & Manecksha) for the third respondent.

Abdul Aziz JCA (delivering judgment of the court): This was the appellants' application for an order that my learned brother, Denis Ong JCA, be at liberty 'to recuse himself from hearing and determining all further proceedings in the appeal herein'. He was the presiding judge in the panel of this court that was to hear the appeal on 6 May 2002. On that day, the appellants' counsel orally raised the appellants' objection to my learned brother's hearing the appeal, but was asked to file a formal application for disqualification, and the hearing of the appeal did not proceed. The application was duly filed, and was heard on 8 May 2002.

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A It is necessary to set out certain previous events that the appellants adverted to in support of their application.

B The appellants' appeal was from the dismissal by the High Court on 31 January 1997 of their suit in which they claimed that a share-sale agreement between the first and third respondents was invalid and therefore sought certain necessary reliefs. The dismissal of the suit meant that an order of injunction that the appellants had obtained to restrain the disposal of the shares ceased to have effect, but on the appellants' application, this court, on 24 February 1997, after hearing all parties, made an order restraining the first and third respondents from dealing with or disposing of the shares until disposal of the appellants' appeal to this court. Mokhtar Sidin JCA was one of the panel that heard the appellants' application.

C On 9 November 1999, when the appeal came up for hearing, the first respondents' counsel raised a preliminary objection on the grounds that the sealed order of the High Court was not in the record of appeal and no chronology of events had been served on the respondents' solicitors. This court allowed the preliminary objection and dismissed the appeal without hearing its merits. Denis Ong JCA was one of the panel that heard and ruled on the preliminary objection.

D On 16 May 2000 the Federal Court allowed the appellants' appeal from the dismissal of their appeal and remitted the appeal to this court for determination.

E The appeal was fixed to be heard on 19 April 2001 before a panel in which Mokhtar Sidin JCA was the presiding judge.

F On 17 April 2001, two days before the appeal was to be heard, the second respondent's solicitors wrote to the deputy registrar to request him to bring to the attention of the panel the fact that Mokhtar Sidin JCA was one of the panel that, on 24 February 1997, 'telahpun mendengar percikaraan permohonan dan merit kes tersebut'. To my mind, what the second respondent's solicitors meant by those words was that the panel of 24 February 1997, before deciding on that day to grant the injunction pending appeal, had necessarily to look at the merits of the case, at least to the extent necessary for determining that the appeal was not doomed to failure. The second respondent's solicitors ended their letter with a request that the hearing of the appeal be adjourned to another day, saying that the solicitors for the first and third respondents supported their application.

G No reason was expressly given for the request for adjournment, but to my mind, the second respondent's solicitors must have meant that the hearing of the appeal on 19 April 2001 ought to be adjourned because Mokhtar Sidin JCA ought not to sit on the panel, having considered the merits of the appeal to the extent that I have mentioned. The request implied that to the second respondent's solicitors, Mokhtar Sidin JCA ought not to hear the appeal.

H Next day, on 18 April 2001, the third respondent's solicitors wrote to the Chief Justice, the Chief Judge of Malaya and the deputy registrar to express their support for the request for adjournment of the second

respondent's solicitors, which they said, correctly in my view, was on the ground that Mokhtar Sidin JCA had heard the merits of the case. The letter also implied that to the third respondent's solicitors, Mokhtar Sidin JCA ought not to hear the appeal.

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Consequently, when the appeal came up for hearing on 19 April 2001, Mokhtar Sidin JCA disqualified himself from hearing the appeal and adjourned the hearing to a date to be fixed.

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The hearing of the appeal was fixed for 16 July 2001, but by a letter dated 3 July 2001, the deputy registrar informed the parties that the hearing was postponed.

On 5 July 2001, the third respondent's solicitors wrote to the deputy registrar in response to the deputy registrar's letter of 3 July 2001, to give the names of judges of this court and of the High Court that had heard the case, which included Mokhtar Sidin and Denis Ong JCA, and to ask for an early date of hearing before a panel that did not include those judges. The letter implied that to the third respondent's solicitors, Denis Ong JCA ought not to hear the appeal.

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As I said, the appeal came on for hearing on 6 May 2002, when the appellants raised their objection to Denis Ong JCA's hearing the appeal. None of the respondents had any objection then to Denis Ong JCA's hearing the appeal. I think I ought to say straightaway that I was of the view that the fact that the third respondent's solicitors had earlier, as indicated by their letter dated 5 July 2001, considered that Denis Ong JCA ought not to hear the appeal was irrelevant to the present application and did not preclude the third respondent from withholding his support for the present application.

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The appellants' reasons for contending that Denis Ong JCA ought not to hear the appeal were primarily stated in para 5 of their affidavit in support of their application. They relied on the principle that justice must not only be done but must also be seen to be done. Relying on that principle, while 'not alleging any actual bias' on the part of Denis Ong JCA, they said that 'an impartial and reasonable and fair-minded bystander with knowledge of the relevant facts' would think that 'there is a real danger of bias that a fair hearing ... before [Denis Ong JCA] will no longer be possible however much [Denis Ong JCA] may judiciously strive to avoid it'. The 'relevant facts' that the appellants cited was the fact that Denis Ong JCA was on the panel that made the decision on 7 November 1999 to dismiss the appeal, a decision adverse to the appellants, on a preliminary objection.

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As was apparent from the submission of the appellants' counsel, that reason was advanced in reliance on the following statement of NH Chan JCA in *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin* [1995] 2 MLJ 213 at p 228:

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To disqualify a judge, there must be circumstances or facts which have been shown to exist which would lead a reasonable and fair-minded onlooker or which would have given reasonable ground for him to suspect that the case would not be decided according to the evidence.

I

- A** The appellants, in para 5 of their affidavit, were in effect saying that even though the dismissal of the appeal was on purely technical or procedural grounds, and even though, therefore, Denis Ong JCA had not considered the merits of the appeal or formed any idea in his mind as to the merits of the appeal, an impartial, reasonable and fair-minded bystander who knew of those circumstances would nevertheless, simply because the appeal was dismissed, fear that when Denis Ong JCA heard the appeal on its merits, he would not be able to keep his deliberations free from bias even though he tried his best to do so. But the appellants did not say by what process of thinking the fair-minded and informed bystander would entertain a fear of bias from those circumstances. Knowing that Denis Ong JCA had not been involved in the merits of the appeal, what would make the fair-minded bystander fear that he might be biased when he came to consider the merits? Rather it is, I thought, the ignorant and unreasonable bystander who would entertain such a fear. It is not so much the fact that a decision adverse to the appellants, that is the dismissal of their appeal, had been made that is important. What is important is the fact that in making that decision, the panel, including Denis Ong JCA, had not considered the merits. No reasonable bystander who knows of the circumstances would fear that Denis Ong JCA might be affected by bias when he comes to consider the merits. There was, in my view, simply no circumstance to cause a fair-minded and informed bystander to entertain a fear of real danger of bias. I was, therefore, of the opinion that the application should be dismissed.
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- E**

- I have taken the trouble to set out the facts showing that the respondents' solicitors considered that Mokhtar Sidin JCA ought not to sit on the panel that was to hear the appeal on 19 April 2001 and that on that date, Mokhtar Sidin JCA disqualified himself. What of those facts? The appellants in their affidavit did not expressly cite those facts as forming part of the facts which would make the fair-minded and informed bystander fear a real danger of bias. It was only in the submission of their counsel that those facts were employed. He said, if I have taken it down correctly, that a reasonable bystander having knowledge of the stand of the respondents' solicitors about Mokhtar Sidin JCA and of the fact that Denis Ong JCA sat on the appeal when it was dismissed on a preliminary objection, would apprehend a real danger of bias. In my opinion, the stand of the respondents' solicitors as regards Mokhtar Sidin JCA, and Mokhtar Sidin JCA's decision to disqualify himself, whether the reason for that stand and for that decision was that Mokhtar Sidin JCA had looked at the merits of the appeal or otherwise, had no relevance whatsoever to the question of the fair-minded and informed bystander's perception of the likelihood of bias on the part of Denis Ong JCA.
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Order accordingly.